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ABSTRACT

Despite Stanley Fish's assertion that the interpretive communities basic to his theory of literary and legal interpretation are "engines of change," it seems clear that in Fish's conception of change, "plus ca change, c'est plus la meme chose." In particular, Fish denies that the legal profession can achieve the more fundamentally egalitarian practices advocated by legal scholars. His fatalistic attitudes toward change are based in his essentialized construction of interpretive communities; these attitudes constitute a fundamental departure from the pragmatic rhetoricism that he extols. A minor adjustment, however, in Fish's conception of how interpretive communities function will retain the explanatory rigor of his theories while purging them of their essentialism. The point is not to deny the power of social conditioning in the formation of viewpoints from within an interpretive community but rather to deny that social conditioning is ultimate, that interpretive communities are inescapable or impervious to fundamental change. A new and more rhetorical way of thinking about interpretive communities might begin with Fish's analyses of the First Amendment and the parol evidence rule, a provision of contract law that demands that judges consider only the written language and agreement and not the context surrounding it. Fish suggests that when the First Amendment is honored in the breach, it nonetheless functions to "slow down outcomes." Similarly, interpretive communities might be seen as constraints on thinking that can be breached but which guide, to some degree, the act of breaching itself. (Contains nine references.) (TB)

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# Fish's Constructions of the Interpretive Community, the Parol Evidence Rule, and the First Amendment

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Despite Stanley Fish's assertion in Doing What Comes Naturally that the interpretive communities basic to his theory of literary and legal interpretation are "engines of change" (146), it seems clear that Victoria Khan is correct when she says that "in Fish's conception of change, plus ca change, c'est plus la meme chose" (29). In particular Fish denies that the legal profession can achieve the more fundamentally egalitarian practices advocated by many other legal scholars. Fish's fatalistic attitudes toward change are based in his essentialized construction of interpretive communities; these attitudes constitute a fundamental departure from the pragmatic rhetoricism that he sees himself as extolling. My argument here is that a minor shift in Fish's conception of how interpretive communities function will retain the explanatory rigor of his theories and, in fact, increase their rigor by purging them of their essentialism. Furthermore, this minor shift is warranted by the analyses of legal rhetoric in Fish's most recent work.

The center of Fish's theory of interpretation is that "meanings are the property neither neither of fixed and stable texts nor of free and independent readers but of interpretive communities that are responsible both for the shape of a reader's activities and for the texts that those activities produce" (Text 322). The theory has, therefore, the advantages of avoiding intentionalist and acontextualized constructions of legal and literary texts while at the same time

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constraining the possible caprices of individual readers. The primary objection to this theory -- and I am by no means the first to make it -- is that these interpretive communities are more than a little monolithic, and that in his description of them Fish makes a metaphysical concept out of the process of socialization. Fish himself occasionally admits this, as when he says that each interpretive community constitutes "a core that does all the work an essentialist might desire" (No Such 240); furthermore, all communities are equally constraining, and each individual subject is equally -- totally -- constrained:

> If you are a finite being, and therefore situated, you are wholly situated, and no part of you or your experience is asituational; your every capability is positive, a reflection and extension of the system of belief that bespeaks you and your possibilities, and there is nothing negative (detached, independent, free) to nurture. And if you are not a finite being . . . . you are a god, and growth is beside the point. (Doing 18).

Exclusion of middles is something of a habit with Fish -- it's tempting to read it as a Calvinist retention from his work on Milton -- one is either part of the Preterite or the Elect. Because all interpretive communities work on all of their subjects in the same way, Fish's theory partakes of the very qualities that he condemns in formalist "grounds of knowledge": "abstractness, generality, invariance across contexts" (Doing 343). Furthermore, although Fish believes -- I think rightly -- that all utterances, all acts of interpretation are rhetorical and therefore political, the abstract nature of his interpretive communities serves to obscure their internal politics. If a dispute arises within a community, it will, he says, "be adjudicated with reference to the norms, standards, and procedures understood by the community" (Doing 442). We might note the use of the divine passive here. All told it is, I think, quite reasonable to read Fish's theory as Daniel O'Hara

does, as, first, attempting to ensure the replication of particular communities' power structures into the future, and, second, as fundamentally taking laissez-faire capitalism and bumping it up one level -- instead of individual, radically separate subjects competing for economic advantage, it grants us radically separate interpretive communities competing in the marketplace of ideas. (46)

Fish carefully notes that there is no program behind his theory -- an impossibility given his perception that all discourse is rhetorical -- that he is not prescriptive but descriptive of what he calls "an epistemological necessity" (Doing 116), and that he is equally disdainful of the pieties of the intellectual right and left. However, we might keep in mind here that, as John Michael and Samuel Weber point out, that the goal of assuaging anxiety is central to much of Fish's work: repeatedly he counsels his readers "Not to worry," "Relax," "Stop worrying and learn to love interpretation." Clearly, "Relax" means something very different when you say it to an activist than it does when you say it to a supporter of the status quo. And Fish is also fond of repeating variations on the dictum that his work "leaves our practices precisely where it found them" (No Such 21). Again, not to worry, unless you are not entirely fond of what Roberto Unger calls "the sanctification of actuality" (Knowledge and Politics 139).

Much of Fish's most recent work tries to undercut the project of socially-motivated theorists -- that of constructing what he calls "a liberal utopia of enlarged sympathies" (No Such 25). With respect to the legal community, Fish argues that the attempts by scholars as different as Unger and James Boyd White, and by interpretive praxes as different as deconstruction and Anglo-American feminism, to challenge

the legal status quo cannot actually remake legal praxis because the purpose of law is to deny such an attempt. Fish agrees with Unger and his allies in the Critical Legal Studies movement that the law is internally contradictory in that it tells "two stories at the same time" (163): one in which legal praxis is based upon an ideologically neutral and stable set of formal procedures, and the other in which it absorbs ideological agendas into these procedures, carefully declaring these agendas to be non-ideological all the while, in order to respond to current societal exigencies. Fish sees this necessary fiction as being the very nature of law, which is "at once thoroughly rhetorical and engaged in the effacement of its own rhetoricity" (170); without it, the law would no longer perform its function, would no longer be the law.

That this necessary fiction plays into the hands of those who would define "lawyer" as the nom de guerre for "con artist" apparently does not concern Fish nearly as much as the possible alternatives to it. Fish sees the rightist demand for a fully formal legal practice and the leftist demand for a complete deconstruction of such practice -- to be followed by a more consistent and egalitarian legal system -- as, respectively,

> [e]ither the impossible alternative of grounding the law in perspicuous and immutable abstractions, or the unworkable alternative of intruding that impossibility into every phase of the law's operations, unworkable because the effect of such intrusions would be so to attenuate those operations that they would finally disappear. That leaves us with the law as it is, something we believe in because it answers to, even as it is the creation of, our desires. (179)

The problem here, of course, is in how we define "us." Here we might keep in mind Fish's reply to White's call for a legal system that makes considerations of what kind of culture we should have the basis of its

practice:

> The fact that a legal question can always be shown to have a source in in presupposed cultural values does not mean that it is the business of a legal inquiry to discover or revise those values. Of course one could always engage in that business, but to do so would not be to practice the law as the institution's members now recognize it. (173)

In Fish's view, White is asking lawyers to act as social philosophers, to change their essential paradigm, an impossible task since the paradigm is constitutive of their interpretive community. The law's purpose is, thus, to answer to our structural desires, but not our political or sociological desires. We are, thus, led again to the central paradox of Fish's work, that his pragmatic, rhetorical stand cannot lead to anything helpful; the only conclusion I can draw here is that Fish is extolling an antirhetorical rhetoric, one that is, in Isocrates' words, "wholly divorced from our necessities" (qtd. "Rhetoric" 207). Again, the reasoning behind this is that our situatedness in interpretive communities is total. We can, therefore, only make change within the constraining paradigms of our own interpretive communities, and cannot become "less hostage to the urgencies of a particular vision and more responsive to the needs of men and women in general" ("Rhetoric" 218).

Fish's arguments are, as always, creative and internally logical; but, as much of anti-essentialist thought reminds us, "logic" itself is merely another rhetorical construction; furthermore, there are also "logical" arguments against his contention that the power of interpretive communities prevents radical change. First of all, we might view Fish's use of "constraint" as insufficently nuanced, as Gregory Currie does: Fish's apparent argument is that, because our actions are always constrained by interpretive communities, they are never free. But if

constraint and freedom are necessarily mutually exclusive, 2500 years worth of philosophical debate about free will would never have happened. "For it is agreed on all sides that human beings are always constrained. But things are not so simple: constraint rules out freedom of action only when the constraint is so tight that it precludes all but one course of action" (215). Fish might respond to this -- again -- that the constraint he describes precludes an expansion of our sympathies to those in interpretive communities other than our own, but I believe that the fact that White, Catherine MacKinnon, Unger, Patricia Williams, and many other scholars have made coherent cases for such an expansion of sympathies from within the legal community makes this constraint seem surmountable.

Moreover, Fish himself attempts to nuance his theory by speaking of belief structures as being "nested" but evoked simultaneously: that if you are an academic who is also a feminist, you invariably act as an academic-feminist. At this point, he describes himself as "a teacher, a student of interpretation, Jewish, a member of a law faculty, a (passionate) consumer, short, the oldest of four children," etc. It seems to me that by "nesting" communities to such a degree Fish ends up with something that is very close to liberal individualism.

I do not wish to deny the power of our social conditioning; I merely wish to deny that that power is ultimate, that our interpretive communities are inescapable or impervious to fundamental change. Accordingly, I would claim that a new and more rhetorical way of thinking about interpretive communities might begin in Fish's analyses of the First Amendment and the parol evidence rule, which is a provision of contract law that demands that judges consider only the written language

of a agreement and not the context surrounding it. (Given Fish's belief that a literal, unmediated reading of any text is impossible, it is one of his favorite provisions to cite.) Both the First Amendment and the parol evidence rule are asserted by the legal system as being inviolable, but both of them (in another example of the "two stories" of the law) are often subsumed by judges' particular agendas. Fish says that this situation does not render either the parol evidence rule or the First Amendment useless:

> The important fact about Masterson [a bankruptcy case] is not that in it the court succeeds in getting around the parol evidence rule, but that it is the parol evidence rule -- and not the first chapter of Genesis or the first law of thermodynamics -- that it feels obliged to get around. That is, given the constraints of the institutional setting . . . the court could not proceed on its way without raising the parol evidence rule . . . consequently, the path to the result it finally reaches is constrained, in part, by the very doctrine that result will fail to honor. (151; emphasis Fish's)

Similarly, Fish says of the First Amendment that when it is honored in the breach, it nonetheless functions to "slow down outcomes" (113). We might see the interpretive communities in a similar light, as constraints on our thinking that can be breached but which guide, to some degree, the very act of breaching themselves.

It is, I think, an interesting and useful irony that we can view interpretive communities as slowing down outcomes rather than stopping them, because Fish's method at the outset of his work on hermeneutics was designed, he said, "to slow down the [interpretive] experience so that 'events' one does not notice in normal time, but which do occur, are brought before our analytical attentions" (Text 28). Some of these events are moments of utter confusion, moments of certainty, followed by the realization that one's tentative hypotheses are false, followed

by the formation of new hypotheses and the discovery that they, also, are incomplete. This sounds much more like my own interpretive experience than does Fish's description of being embedded in an interpretive community in which "what you think to do . . . will issue from you as naturally as breathing" (Doing ix). Furthermore, it sounds, by my lights, healthy. I would not go so far as to call a little cognitive dissonance an unalloyed good, but I recognize it in myself and in my students as a sign that something is happening -- we are producing change -- and I would point out that this is true of interpretive communities as well as the individuals who shape them, and are shaped by them. The ferment that Fish's view of legal rhetoric brings to our discussions is beneficial, but much moreso if we keep in mind that, if the law has room for two narratives -- if it needs the illusion of formalism -- those who practice it and critique it need at least the illusion that our actions are efficacious.

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